

HENRY W. BEGAY
v.
AREA DIRECTOR, NAVAJO AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 82-13-A

Decided October 15, 1982

Appeal from a decision of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellant.

Reversed.

1. Board of Indian Appeals: Jurisdiction

Under 25 CFR 2.19(a) and (b), when the Commissioner of Indian Affairs, or the official of the BIA exercising the Commissioner's review authority under 25 CFR Part 2, does not issue a decision within 30 days of the filing of all pleadings, the Board of Indian Appeals acquires jurisdiction over the case.

2. Administrative Procedure: Rulemaking--Indians: Welfare--
Regulations: Publication

Under 5 U.S.C. § 552(a)(1) (1976) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be deprived of benefits solely on the basis of an eligibility standard published only in the BIA manual.

3. Indians: Welfare

Under the system established in the BIA manual, custodial care is part of the general assistance program, and an individual must first be found eligible for general assistance before he or she can be considered for custodial care assistance.

4. Indians: Welfare

Under the provisions of the BIA manual, an individual is eligible for custodial care assistance even though the necessary care may be provided in the individual's home.

5. Indians: Welfare

When, due to age, infirmity, or physical or mental impairment, an individual requires any type or amount of assistance in daily living, that person qualifies for custodial care under the provisions of 66 BIAM 5.10A.

6. Indians: Welfare

Under 66 BIAM 5.10D(2), any continuing care arrangements necessary for an individual who has been in a custodial care institution must be prepared before that individual is discharged from the institution.

7. Indians: Welfare

The decision to terminate custodial care for an individual must be documented as based upon physical or mental improvement, or upon an initial erroneous determination of the individual's condition.

8. Rules of Practice: Appeals: Effect of

Under 25 CFR 2.3(b) and 43 CFR 4.21(a), a decision which is subject to review by a higher Departmental official is not effective during the appeal period or during the pendency of an appeal, unless the BIA official to whom an appeal is made, the Board, or the Director of the Office of Hearings and Appeals determines that the public interest requires the decision to be made effective immediately.

APPEARANCES: Stephen T. LeCuyer, Esq., DNA-People's Legal Services, Inc., Chinle, Arizona, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Appellant Henry W. Begay, a Navajo Indian residing at the Fort Defiance Agency, Fort Defiance, Arizona (C #97,476), has sought review of a July 24, 1981, decision of the Navajo Area Director, Bureau of Indian Affairs (BIA) (appellee), terminating his financial assistance. This appeal was filed jointly with 19 other appeals from Navajo residents of the Fort Defiance and Chinle Agencies, Navajo Area Office. 1/ Appellant had been receiving care and training 2/ at Toyey Industries (Toyey), Toyey, Arizona. The decision affirmed that appellant was not eligible for custodial care under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A because he did not require "care from others in his or her daily living" "due to age, infirmity, physical or mental impairment" (66 BIAM 5.10A). 3/

History of BIA Involvement with Toyey Industries

The following facts are adduced from appellant's undisputed background statement concerning Toyey Industries. 4/ The institution is located in Toyey, Arizona, within the Navajo Nation. It was established in October 1976 under the administration of the Navajo Tribal Council and the Navajo Division of Education, Department of Navajo Vocational Rehabilitation. Toyey was chartered as a nonprofit organization by the Navajo Tribal Council in August 1979.

Toyey's institutional objectives were to provide comprehensive residential maintenance, work activities, and other support services to mentally and/or physically handicapped adults. These services were intended to help the individual toward semi-independent or independent living by providing training in job and living skills.

It is not apparent from the record when and under what circumstances the BIA Branch of Social Services for the Navajo area first became involved with Toyey. 5/ It appears, however, that at least during fiscal year 1980

1/ One appeal was dismissed at the request of the appellant. Phillip Begay v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 9 IBIA 280 (1982). Decisions relating to the remaining 18 appellants are being separately issued today.

2/ Although appellant notes that both BIA and he use the terms "adult institutional care" and "custodial care" interchangeably to describe the type of assistance he was receiving, see appellant's opening brief of legal issues (hereinafter "opening brief"), the Board does not agree that the terms are synonymous. See text, infra at 10 IBIA 201-02.

3/ According to appellant, and not denied by appellee, every BIA social services client at Toyey from the Fort Defiance and Chinle Agencies was also found by the BIA to be ineligible for custodial care (Opening brief at 37-38).

4/ See opening brief at 1-5, including exhibits cited in that discussion.

5/ Although it is clear from the statements of both parties that the BIA Navajo Area Office Branch of Social Services had a contract with Toyey, no copy of that contract is included, or was sought to be included, in the administrative record.

the branch was providing funds to Toyei under a contract in accordance with P.L. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450-450n (1976), 6/ the Indian Self-Determination and Education Assistance Act. 7/

In the summer of 1980, the branch learned that its fiscal year 1981 appropriation would be reduced and that it would be unable to continue its existing level of funding. After some discussion of how this budgetary problem might be resolved, it was finally determined that the funding for Toyei should be cut entirely. This determination was made on the grounds that Toyei's clients were at the institution primarily for vocational training rather than for residential care. Vocational training was thought not to be part of the functional responsibilities of the Branch of Social Services. As the decision was explained in a memorandum to social services files from the Area Social Worker:

On September 17, 1980, the plan to discontinue funding Toyei Industries was decided as the only alternative. The basis for this decision is that Toyei Industries, Inc., operates a Vocational Training Program for handicapped adults. The fact that people reside there is secondary. It was argued that these clients can function at home and do not need custodial care. The revised plan assumed that the proposed recommendation would take effect October 1, 1980. [8/]

Following the decision to discontinue funding to Toyei, the Branch of Social Services began the procedure of informing appellant and other individuals at Toyei of the termination of funding for their care and training at the institution.

Background of Appellant's Case

The record as constituted 9/ presents no information on appellant predating his receipt of a letter dated October 20, 1980, from the Navajo Area Director. Consequently, the record does not show when or for what reason appellant was first referred to Toyei. There is no dispute, however, that while at Toyei appellant was receiving care and training under the contract with the BIA Branch of Social Services.

The October 20, 1980, letter which appellant received informed him that:

[F]inancial assistance to Toyei Industries for your residential care is being terminated because the contract for Fiscal Year 1981 with Branch of Social Services has been declined by the Bureau of Indian Affairs. The reason for declination is that

6/ All further citations to U.S.C. are to the 1976 edition.

7/ See Exh. A to opening brief at 2.

8/ See Exh. C to opening brief at 1-2.

9/ As to the composition of the record, see discussion of appellee's motion to reconsider the Board's order of June 28, 1982, infra at 10 IBIA 195.

the vocational rehabilitation service at Toyei Industries is not a functional responsibility of the Branch of Social Services. However, Toyei Industries' application for a contract will be considered by the Bureau of Indian Affairs, Public Law 93-638 Committee, for possible funding by BIA Career Development.

You are further informed that all financial assistance for you from BIA Social Services will cease on November 6, 1980. In accordance with 25 CFR 20.30, you have a right to appeal this decision on your assistance. You have until November 6, 1980 to request a hearing on your case.

See, e.g., Exh. E to opening brief.

Appellant requested a hearing on November 3, 1980. On November 24, 1980, the Area Director rescinded the October 20, 1980, termination notice. The second letter sent to appellant stated: "It has been administratively determined that services will continue for you until a complete evaluation can be made of your situation by the Branch of Social Services, Bureau of Indian Affairs." See Exh. I to opening brief.

The only written evaluation of appellant in the record is the December 8, 1980, evaluation form prepared by the BIA social worker. That form indicated that appellant was completely independent and his self-care potential was "high." The social worker found that appellant's sister was "capable and willing to care for" him and that the "home [was] adequate * * * although client has to walk to the outhouse." The reporter concluded that appellant "was placed at Toyei * * * primarily for training. Client does not need supervision and his potential for self-care is high. This client does not require custodial care." See Exh. A to Henry W. Begay individual file.

Appellant received a letter dated December 22, 1980, from a BIA Agency Social Worker informing him that his "Adult Institutional Care" would be terminated effective January 12, 1981. The letter advised: "The reason for this closure is * * * you do not meet the eligibility requirements as defined in 66 BIAM 5.10 in that you do not require care from others in daily living due to age, infirmity, physical or mental impairment." The letter further informed appellant that he might still be eligible for other forms of assistance and that he had a right to appeal the decision to the Agency Superintendent. See, e.g., Exh. J to opening brief.

Appellant requested a hearing on his termination on January 9, 1981. A hearing for appellant and other similarly situated individuals was held on February 18, 1981. Testimony at the hearing indicated that appellant was born on February 1, 1939, his self-care potential was high, his sister was willing to care for him, and had been placed on "shelter employment," but did not have a job. The social worker who evaluated appellant based her decision on a 45-minute discussion with appellant. She did not speak with any Toyei employees about appellant. See transcript of Fort Defiance hearing,

February 18, 1981, at 3-14. ^{10/} Following the hearing, the hearing officer, as the designee of the Superintendent, sustained the termination of appellant's custodial care.

On March 26, 1981, appellant appealed the hearing officer's decision to the Navajo Area Director. The Area Director affirmed the decision on July 24, 1981. This affirmance rejected all of appellant's legal arguments and found that the facts proved that appellant did not require custodial care.

Appellant appealed this decision to the Assistant Secretary for Indian Affairs on August 25, 1981. The appeal was referred to the Deputy Assistant Secretary--Indian Affairs (Operations). When a decision had not been issued within 30 days from the time briefing to the Deputy Assistant Secretary was concluded, appellant filed a notice of appeal with the Board of Indian Appeals on February 10, 1982. This appeal asked the Board to assume jurisdiction over the appeal pursuant to provisions of 25 CFR 2.19. By order dated February 10, 1982, the Board requested BIA to forward the administrative record. On March 16, 1982, the Board issued an order formally docketing the appeal and expediting consideration of the case.

Submissions to the Board include appellant's opening brief (April 28, 1982); appellee's motion to remand this case to Navajo Social Services (May 24, 1982); appellant's motion to exclude certain documents filed by appellee after the time established by the Board for supplementation of the record (June 7, 1982) (see Board's order of March 16, 1982); appellant's reply to the motion to remand (June 14, 1982); appellant's reply to the motion to exclude documents (June 15, 1982); appellee's response to appellant's reply to motion to remand (July 6, 1982); appellee's motion for reconsideration of the Board's order excluding documents (July 6, 1982) (see Board's order of June 28, 1982) and appellant's response to appellee's motion for reconsideration (July 23, 1982).

Jurisdiction

[1] Appellant argued in his February 10, 1982, notice of appeal to the Board that, because the Deputy Assistant Secretary had not issued a decision in this case within 30 days from the date briefing was concluded, as is required by 25 CFR 2.19(a), section 2.19(b) vested the Board with jurisdiction. Section 2.19(a) and (b) states:

(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [now Deputy Assistant Secretary--Indian Affairs (Operations)] shall:

(1) Render a written decision on the appeal, or

^{10/} The Board feels constrained to comment on the almost unintelligible nature of the transcript of this hearing. It is impossible to determine who is speaking in many cases, much of the testimony is marked "inaudible," the hearing examiner exercised no control over those attending and testifying, and very little actual evidence concerning the appellant was elicited.

(2) Refer the appeal to the Board of Indian Appeals for decision.

(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision.

In an order dated February 10, 1982, the Board agreed that it had jurisdiction over the case, assuming the facts stated by appellant were true (Order at 2 n.2). The Board noted that appellant's interpretation of 25 CFR 2.19(b) "comports with what the regulation clearly states and was intended to state. See 40 FR 20625 (May 12, 1975)" (Order of Feb. 10, 1982, at 2 n.2). There has been no challenge to the Board's assumption of jurisdiction. The Board holds it has jurisdiction to decide this appeal.

Appellee's Motion for Reconsideration of the Board's
June 28, 1982, Order Excluding Certain Documents

On June 28, 1982, the Board granted appellant's motion to exclude certain documents from the record. In its notice of docketing, issued on March 16, 1982, the Board noted that there were obvious omissions from the record. Therefore, the Board granted permission to supplement the record until March 31, 1982. Appellant responded to this order on March 29, 1982. Appellee furnished additional documents on May 20, 1982, 7 weeks after the deadline for record supplementation. The explanation given for this late submission was that although the Solicitor's Office had received formal notice of the docketing of this appeal in March 1982, counsel for appellee was not designated until May 6, 1982, and, further, that the documents offered had not been sent to the Deputy Assistant Secretary by the Area Director when the appeal was filed with his office.

The Board held that appellee's failure to include the offered documents in the administrative record within the extended time allowed for record supplementation could not be excused. Both the Solicitor's Office and BIA had a responsibility to ensure that administrative review by the Deputy Assistant Secretary and by the Board was conducted with full knowledge of the facts upon which the initial decisions were based. The failure to inform appellant of these documents and to properly include them in the record was regarded by the Board as an impermissible threat to the integrity of the administrative review process.

Appellee raises no new arguments in the motion for reconsideration that show how the Board's order was in error or an abuse of discretion. Instead, appellee merely restates considerations that were before the Board when it issued the order and attempts to include the information in the excluded documents by incorporating such material in the memorandum supporting its motion.

Because of appellee's failure to show how the Board's order may have been in error, reconsideration of the June 28, 1982, order excluding documents submitted by appellee on May 20, 1982, is denied.

Appellee's Motion to Remand

On May 24, 1982, appellee moved the Board to remand this case to Navajo Social Services. The motion, which consists entirely of conclusory statements not supported by either factual assertions or legal argumentation, is apparently based on BIA's determination that its Branch of Social Services was improperly or illegally paying for custodial care for appellant at Toyei.

Appellee's conclusion appears to be based on two findings. One, because the vocational rehabilitation program at Toyei was not a functional part of BIA's social services program, the Branch of Social Services was illegally paying for services rendered appellant out of a congressional appropriation not made for that purpose. ^{11/} Second, appellant should have been evaluated first for eligibility for general assistance, then for custodial care, because custodial care is part of BIA's general assistance program. Appellee seeks a remand to Navajo Social Services, which is now responsible for implementing the BIA social services program, so that appellant can be properly evaluated for eligibility for BIA assistance.

Appellant opposed a remand on June 14, 1982.

In its brief, which the Board received on July 6, 1982, appellee states at page 2: "The Bureau does not object to Appellants' unwillingness to remand the cases to Navajo Social Services. Eligibility determination undoubtedly should be a coordinated effort by the Bureau and Navajo Social Services."

Both of appellee's positions demonstrate a basic misunderstanding of the nature and purpose of remand. "Remand," according to Black's Law Dictionary (Rev. 4th ed. 1968) at page 1457 means "[t]o send back," "[t]he sending the cause back to the same court out of which it came, for purpose of having some action on it there." According to both parties, the Navajo Tribe did not assume responsibility for administering the BIA social services program until October 1, 1981. ^{12/} The tribe, therefore, never previously considered this case, which was decided by the Navajo Area Director, BIA, on July 24, 1981. Although the tribe may be the appropriate entity to determine appellant's current eligibility for BIA social services or financial assistance, the present case cannot be "remanded" to it or any of its instrumentalities.

Furthermore, remanding the issue of eligibility determination to BIA, rather than to the tribe, would serve only to delay the issuance of a decision which BIA has already reached. Appellee seeks a remand to make a determination of whether appellant was eligible for general assistance so that he can be considered for custodial care. Whether or not appellant is found eligible for general assistance, BIA has already decided that he is not eligible for custodial care. The possibility that he would be found eligible

^{11/} Presumably appellee does not seek a remand if the Board accepts this argument. The Board declines to consider the argument, however, because appellee has offered no support for it.

^{12/} See appellee's motion for remand at 3; appellant's consolidated reply brief at 3-4.

for both general assistance and custodial care on remand is extremely remote. Under the circumstances of this case, the Board holds that BIA's failure to determine whether appellant was eligible for general assistance before determining whether he was eligible for custodial care is harmless error.

Appellee's motion for remand is denied.

Issues on Appeal

The remainder of this case raises three major issues:

1. Whether appellant was properly receiving assistance before his termination;
2. Whether the assistance appellant was receiving was properly terminated; and
3. Whether BIA must continue assistance to appellant pending a determination of this case by the Board.

Discussion and Conclusions Relating to the Termination of BIA Assistance to Appellant

A. Appellant was Properly Receiving Assistance Under the Contract with Toyei Industries.

Appellant began receiving BIA assistance when he was referred to and accepted by Toyei Industries for training in vocational and living skills. Appellee apparently argues that appellant was improperly or illegally receiving this assistance because he was not evaluated for eligibility for BIA general and custodial care assistance when he was referred to Toyei. ^{13/} This argument assumes that in order to receive assistance under a contract with Toyei, an individual must be eligible to receive both BIA general assistance and custodial care.

The Board finds that this assumption is a legal conclusion for which there is no evidence in the record. The terms, conditions, and purposes of the BIA contract with Toyei govern determinations of eligibility for receipt of services under it. ^{14/} Appellee nowhere states that appellant was receiving services at Toyei in violation of the BIA contract. ^{15/} Furthermore, appellee has neither introduced a copy of the contract to show what

^{13/} Although the circumstances of this case do not require a decision on this question, the Board notes that appellee's argument essentially seeks a legal conclusion that appellant can be denied assistance because BIA did not properly determine his eligibility.

^{14/} See, e.g., 17A C.J.S. Contracts §§ 295-296 (1963), and cases cited herein; 17 Am. Jur. 2d Contracts §§ 244-246 (1964), and cases cited therein.

^{15/} Indeed, appellee's presentation to the Board ignores the fact that appellant was initially receiving assistance under this contract, except to argue that the contract was improperly entered into by the Branch of Social Services.

eligibility criteria it establishes, 16/ nor presented arguments tending to show that the custodial care provisions of 66 BIAM Part 5 were to be used to determine eligibility.

In the absence of any evidence that appellant was not eligible to receive assistance under the BIA contract with Toyoi Industries, the Board holds that he was properly receiving such assistance.

B. Appellant's Custodial Care Assistance Was Improperly Terminated.

1. Appellant was Receiving Custodial Care Following the Expiration of the Contract with Toyoi Industries.

Following his receipt of BIA's letter of October 20, 1980, informing him that the contract with Toyoi would not be renewed, 17/ appellant exercised his appeal rights and requested a hearing on the termination of his assistance. The BIA then rescinded the October letter and determined to provide assistance to appellant pending a complete evaluation of his circumstances. See Exh. I to opening brief; text, supra at 10 IBIA 193. Although BIA did not indicate the source of this assistance, it is apparent from the way BIA has approached this case that the assistance was from its general assistance and/or custodial care funds.

The question whether BIA was legally required to provide assistance to appellant from its custodial care funds after the expiration of the contract with Toyoi and pending a determination of his eligibility for custodial care is not before the Board. However, once BIA undertook to provide such assistance by informing appellant that it would be available to him pending a complete evaluation of his situation, appellant acquired certain rights. These rights are discussed in the following sections.

2. Appellant Had a Right to Proper Publication of the Basis for Custodial Care Eligibility Determinations.

Appellee maintains that appellant was not eligible for custodial care under 66 BIAM 5.10A. That section states in part:

Custodial care for adults is that non-medical care and protection provided to an eligible client when, due to age, infirmity, physical or mental impairment, that client requires care from others in his or her daily living. This may be provided in the most appropriate non-medical setting, including the client's home, an

16/ There is no suggestion that this contract was included among the documents affected by the Board's order of June 28, 1982, excluding certain documents.

17/ The question whether the nonrenewal of the contract is a valid reason for terminating assistance to those individuals participating in the program established under the contract is not before the Board. However, the Board has held that the nonavailability of appropriated funds relieves BIA from the responsibility of providing funds. See Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196, and 10 IBIA 23 (1982).

institution or other group care setting. This care encompasses protection and personal services in addition to food, shelter, laundry, and related costs. This type of care ordinarily includes services of a professional nature where medical supervision is not required on a continuing basis.

Appellant argues that 66 BIAM 5.10A sets forth either a substantive rule of general applicability or a statement of general policy or interpretation of general applicability within the meaning of 5 U.S.C. § 552(a)(1)(D), 18/ and that this provision should, therefore, have been published in the Federal Register. Because the BIA manual provision was not so published, appellant reasons that 5 U.S.C. § 552(a)(1) 19/ prevents its application to him.

The BIA responds that the manual provision is merely an interpretation of the regulations in 25 CFR Part 20 and, as such, is not required to be published. The provision need only be available for public inspection and copying under 5 U.S.C. § 552(a)(2)(B). 20/ Since the provision was available to appellant, BIA argues that it has fulfilled its public notice requirements and can apply the standard.

[2] The BIA's position is quite similar to that which it presented to the Supreme Court in Morton v. Ruiz, 415 U.S. 199 (1974). Although BIA promulgated 25 CFR Part 20 after the Ruiz decision, it has failed to understand the Court's clear holding in that case: An individual may not be denied benefits on the basis of an eligibility standard provided only in the BIA manual.

Like the Supreme Court in Ruiz, the Board cannot accept BIA's argument. The BIA manual remains "solely an internal-operations brochure" (415 U.S. at 235), which does not "let the standard [of eligibility] be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." 415 U.S. at 231. Despite the guidance provided in Ruiz, BIA

18/ Section 552 states in pertinent part:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

* * * * *

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

19/ Section 552(a)(1) states in pertinent part: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

20/ Section 552(a) states: "(2) Each agency, in accordance with published rules, shall make available for public inspection and copying: * * * (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

has chosen to publish only the broadest and most general eligibility requirements for assistance in the Federal Register or in 25 CFR Part 20. Only the BIA manual contains provisions of the necessary specificity to permit the actual operation of these programs. Indeed, from reading Part 20, it is not even apparent that BIA provides custodial care. 21/

Contrary to BIA's arguments, the manual provisions do not merely interpret the CFR regulations; rather the manual provides the only usable standards of eligibility for custodial care. Because of this finding, the standard set forth in 66 BIAM 5.10A is a rule within the meaning of 5 U.S.C. 551(4). 22/

Furthermore, as was also true in Ruiz, the rule set forth in section 5.10A is of general applicability. This provision potentially applies to every Native American. There can be no question but that such a rule significantly impacts upon a segment of the public. 23/

Therefore, 66 BIAM 5.10A sets forth a substantive rule of general applicability within the meaning of 5 U.S.C. §§ 551(4) and 552(a)(1)(D). This rule was required to be published in the Federal Register and should have been incorporated into 25 CFR Part 20. The failure to so publish this rule precludes BIA from using it to deprive appellant of benefits. 5 U.S.C. § 552(a)(1); Shoshone and Arapahoe Tribes v. Commissioner of Indian Affairs, 9 IBIA 263, 267-69, 89 I.D. 200, 202-03 (1982). As the Supreme Court stated in Ruiz: "The conscious choice * * * not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries." 415 U.S. at 236. 24/

21/ This fact is emphasized by the disagreement between the parties over what section of Part 20 is "interpreted" by section 5.10A. Appellant, while noting the Area Director's failure to clarify which section of the regulations is interpreted by the manual provision, suggests that it can only be 25 CFR 20.24(b), relating to family and community services. See opening brief at 20; consolidated reply brief at 9-11. Appellee, with the assistance of the manual, contends that custodial care is a form of general assistance. See appellee's memorandum in support of motion for remand at 2; appellee's reply brief to appellants' memorandum in opposition to appellee's motion for remand at 2-3. The general assistance provisions are found in 25 CFR 20.21. 22/ Section 551(4) states in pertinent part: "[R]ule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

23/ The significant impact test was stated in Lewis v. Weinberger, 415 F.Supp. 652 (D.N.M. 1976), in the context of a discussion of whether a policy statement was of "general applicability." Even if the Board had agreed with appellee that 66 BIAM 5.10A is only an interpretation of 25 CFR Part 20, the fact that it is of general applicability would require its publication in the Federal Register. See 5 U.S.C. § 552(a)(1)(D).

24/ A critical review of the BIA manual is set forth in the Final Report, American Indian Policy Review Commission, submitted to Congress on May 17, 1977. See Vol. 1 at 278-79 under the heading "Hidden Regulations."

3. Appellant Had a Right to a Legally Correct Determination of Eligibility.

Assuming that 66 BIAM 5.10A and other provisions of 66 BIAM Part 5 could properly be applied in determining appellant's eligibility for BIA financial assistance, ^{25/} appellee argues that a finding of eligibility for general assistance must precede a finding of eligibility for custodial care. This argument is based on appellee's observation that custodial care is listed under the general assistance section in the BIA manual.

[3] From its review of 66 BIAM Part 5, the Board finds that the manual makes custodial care a form of general assistance. Section 5.2A states in pertinent part: "The general assistance program is intended to meet certain specified unmet financial needs of otherwise eligible Indians. This program includes * * * payment of certain costs directly related to custodial care." Similarly, section 5.10B(1) states: "Payment of custodial care shall be provided from general assistance funds following a determination that 25 CFR 20 eligibility criteria have been met." Thus, under the manual provisions, a determination that an individual is eligible for general assistance must precede a determination that he or she is eligible for custodial care.

Appellee is therefore also correct that the BIA social worker should have been instructed to determine appellant's eligibility for both forms of BIA assistance. In this case, however, the Board has held that BIA's failure to determine appellant's eligibility for general assistance constitutes harmless error. See text, *supra* at 10 IBIA 196-97.

Appellant contends that BIA incorrectly interpreted other provisions of 66 BIAM Part 5 in finding him ineligible for custodial care. First, appellant argues that 66 BIAM 5.10A establishes a two-part inquiry. The initial question is whether an individual requires custodial care. The second question is where that care can most appropriately be provided. Appellant therefore argues that a finding that an individual's care needs can be fulfilled by his or her family does not mean that the individual is ineligible for custodial care.

[4] As appellant notes, 66 BIAM 5.10A establishes a program of financial assistance for individuals requiring "non-medical care and protection" in their daily living without regard to the setting in which that care is provided. Examples of possible settings clearly stated in section 5.10A are "the client's home, an institution or other group care setting." Significantly, section 5.10A(2) states: "In-home care means arrangements made in accordance with a plan approved by the Bureau for the care and supervision of an adult in his or her own home. Casework services should be directed toward providing care and services to the adult in his or her home." In addition, section 5.10A(3) "recognizes the importance of developing plans with clients that will preserve dignity and self-worth and enable the elderly and disabled to remain in their home and community." Thus, a finding that an individual

^{25/} This decision does not reach the question of what other sections of 66 BIAM Part 5 may be required to be published under 5 U.S.C. § 552(a)(1)(D).

who requires care can receive that care from a family member or members does not disqualify that person from participating in the custodial care program established in the BIA manual. The question which BIA must ask under the procedures it has adopted is whether an individual is capable of living by him or herself or whether the individual requires care from others in daily living. See Chinle Agency Superintendent's March 20, 1981, decision, Exh. EE to opening brief.

Appellant further contends that the term "care" as used in the text of section 5.10A must be liberally construed to mean "attention" as well as "maintenance." See Black's Law Dictionary (Rev. 4th ed. 1968) at 267-68. The BIA maintains that whatever meaning "care" may have has been modified by the qualifying term "custodial."

[5] The Board finds that care can encompass a wide range of services, and that some people may require more care than others. When, however, due to age, infirmity, or physical or mental impairment, an individual requires any type or amount of care in daily living, that person qualifies for custodial care under the provisions of 66 BIAM 5.10A. 26/

Appellant also argues that when an individual has been in a custodial care institution, section 5.10D(2) requires that such care not be terminated until a feasible plan has been developed for providing any continuing custodial care that the individual may require. Section 5.10D(2) states that "[o]ccasionally, an individual may not require continued custodial care because of physical improvement. When this occurs, services should be rendered to help him/her leave the care establishment provided an outside plan for care is available and is feasible." Appellant concedes that an improvement in mental condition may also be the reason for a decision that an individual no longer requires institutional custodial care. See opening brief at 29 n.28.

[6] The Board agrees with appellant. Under 66 BIAM 5.10D(2) any continuing care arrangements necessary to provide for an individual who has been in a custodial care institution must be prepared before that individual is discharged from the institution.

Finally, appellant argues that when section 5.10D(2) is read in conjunction with section 5.10B(5), an individual's improvement must be documented in his or her case file. Section 5.10B(5) states: "The case record shall document medical evidence attesting to the physical or mental condition of the individual, and his or her need for custodial care." Appellant contends that, because an individual's mental and physical condition is made the test for whether or not custodial care is required, the termination of such care must be set forth with the same degree of attention to that mental or physical condition.

26/ The extent and type of care that a person requires would influence the amount of financial assistance made available to that individual.

[7] The Board again agrees with appellant's interpretation of these manual provisions. Under the procedures established in the BIA manual, the decision to terminate custodial care for an individual must be documented as based upon physical or mental improvement, or upon an initial erroneous determination of the individual's condition. Any lesser requirement would permit and encourage ad hoc and arbitrary decisionmaking. See Ruiz, supra.

Based on these findings, the Board holds that BIA erroneously interpreted the discussed provisions of 66 BIAM Part 5. The Board declines, however, to decide whether appellant should have been found eligible for custodial care under these provisions, which are not "endowed with the force of law" (see Ruiz, supra at 235), because such a finding is not necessary to the disposition of this case.

C. Appellant's Custodial Care was Improperly Terminated Before a Final Departmental Decision on Eligibility was Rendered.

Appellee argues that BIA is required to continue custodial care payments to appellant only pending a determination of eligibility by the Superintendent. In support of this position, appellee cites 25 CFR 20.30(b), which states: "Upon request for a hearing by a recipient dissatisfied by a proposed decision the recipient's financial assistance will be continued or reinstated to provide no break in financial assistance until the date of decision by the Superintendent or his designated representative in accordance with § 20.30(f) [dealing with the issuance of a written decision following a hearing on the proposed change in assistance]."

Appellant contends that 25 CFR 20.30(f) does not exhaust BIA's responsibilities to continue financial assistance. Instead, appellant argues any decision which is subject to further administrative review within BIA or by the Board is:

[N]ot * * * effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, * * * a decision or any part of it shall be in full force and effect immediately.

43 CFR 4.21(a); see also 25 CFR 2.3(b). These two sections give the authority to declare a decision immediately effective to the Departmental officer to whom the appeal is made, the Board, or the Director of the Office of Hearings and Appeals.

[8] When he filed his appeals, appellant provided both the Area Director and the Deputy Assistant Secretary with forms on which to indicate whether the decision to terminate his care was being made immediately effective. See Exh. R to consolidated reply brief and Henry W. Begay individual file. Neither officer completed the form or otherwise notified appellant that the termination was immediately effective. Thus, there was no proper determination that the termination was to take effect prior to the completion of Departmental review procedures.

In the absence of such a determination, appellant's custodial care assistance, which was to be provided to him pending a complete evaluation of his situation and throughout the administrative appeals process, was improperly terminated before the completion of either. 27/

Summary of Conclusions

Based on the foregoing discussion, the Board holds that it has jurisdiction in this case; that appellant was improperly determined ineligible to receive custodial care on the basis of 66 BIAM 5.10A, an unpublished substantive rule; that BIA incorrectly interpreted other provisions of 66 BIAM Part 5; and that appellant's custodial care assistance was improperly terminated prior to completion of his evaluation. 28/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 24, 1981, decision of the Navajo Area Director, Bureau of Indian Affairs, is reversed. The Board realizes that there may be several ways to remedy the errors noted. Accordingly, BIA is ordered to develop a plan effectuating the Board's holdings in this case. This plan will be filed with the Board within 30 days from the date of this decision.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge

27/ The procedural regulation of the BIA that defers the effectiveness of appealable decisions until completion of the appeal period, unless otherwise directed by an appropriate officer, was viewed with favor in Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976). The court stated that the provisions of 25 CFR 2.3 serve, among other things, to "protect the interests of parties * * *, allow the agency to develop a record, exercise its discretion, apply its expertise, and, possibly, discover and correct its own errors." Id. at 987.

28/ Because of this disposition, the Board does not reach appellant's other arguments.